

ORIGINAL

FILED

February 11 2015

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: AF 09-0688

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Office of Disciplinary Counsel

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*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 09-0688

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IN RE PETITION FOR ADOPTION OF RULE  
5.5(d)(1) OF THE MODEL RULES OF  
PROFESSIONAL CONDUCT

ODC'S COMMENTS

The Office of Disciplinary Counsel ("ODC") offers the following comments  
on the proposed amendments to Rule 5.5, MRPC.

ODC does not take a position as to whether the Court should adopt the  
proposed changes to Rule 5.5. That said, the Court should be aware that the  
proposed provision is a superseded version of Rule 5.5(d), Model Rules of  
Professional Conduct, not the current version. Attached as Appendix A is current  
Rule 5.5.

1 In 2009 the ABA created the ABA Commission on Ethics 20/20. The  
2 mission of the Commission, according to its website, was to “perform a thorough  
3 review of the ABA Model Rules of Professional Conduct and the U.S. system of  
4 lawyer regulation in the context of advances in technology and global legal  
5 practice developments.”<sup>1</sup>  
6

7 In February 2013, the 20/20 Commission issued a report recommending that  
8 foreign lawyers be permitted to serve as in-house counsel in the United States. The  
9 report is attached as Appendix B.  
10

11 On February 11, 2013, the ABA House of Delegates passed a resolution  
12 amending Rule 5.5(d) to include foreign lawyers, with the proviso that when  
13 advising on U.S. or state law, the advice must be based on advice provided by a  
14 lawyer licensed in the applicable jurisdiction. The resolution is attached as  
15 Appendix C.  
16

17 Since most jurisdictions have adopted, to a large extent, the Model Rules, a  
18 collective body of law has developed that helps in interpreting the rules. To the  
19 extent that Montana’s rules do not follow the Model Rules, there are fewer cases  
20 that are useful in interpreting the rules. Therefore, the Court may wish to consider  
21 amending Rule 5.5(d) to also include foreign lawyers.  
22

23 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of February, 2015.  
24

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<sup>1</sup> [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/about\\_us.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html)

OFFICE OF DISCIPLINARY COUNSEL

By Shaun R. Thompson  
Shaun R. Thompson  
Chief Disciplinary Counsel

# APPENDIX A

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## **Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law**

### ***Law Firms And Associations***

#### **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that :

(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac

vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

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# APPENDIX B

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

## **REPORT**

### **Introduction and Executive Summary**

The ABA Commission on Ethics 20/20 proposes to amend Rule 5.5(d) of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) to permit foreign lawyers to serve as in-house counsel in the U.S., but with the added requirement that foreign lawyers not advise on U.S. law except in consultation with a U.S.-licensed lawyer. This Resolution is complemented by a separate Resolution to amend the 2008 ABA Model Rule for Registration of In-House Counsel.

These proposed amendments respond to the increasing number of foreign companies with substantial operations and offices in the U.S. as well as U.S. companies with substantial foreign operations.<sup>1</sup> These companies routinely encounter legal issues that implicate foreign or international law and want the advice of trusted lawyers from other jurisdictions. These companies often find that this advice can be offered most efficiently and effectively if those lawyers relocate to a corporate office in the U.S.

Global organizational clients have an existing and growing need to employ in-house foreign lawyers in their U.S. offices. This development is evidenced by the seven U.S. jurisdictions (Arizona, Connecticut, Delaware, Georgia, Virginia, Washington and Wisconsin) that expressly permit foreign lawyers to work as in-house counsel in the U.S. offices of their clients.<sup>2</sup> The Commission inquired and is aware of no adverse consequences in these jurisdictions from such authority.

Notably, the proposed amendments to Model Rule 5.5(d) and the related Resolution to amend the Model Rule for Registration of In-House Counsel would not authorize the licensing or full admission of foreign in-house lawyers. Rather, the amendments would provide a limited authority to practice for the foreign lawyer's employer on matters that do not involve U.S. law, unless the foreign lawyer consults with a U.S. lawyer authorized to provide such advice.

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<sup>1</sup> See, e.g., ABA Task Force on International Trade in Legal Services, *International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience* (Feb. 4, 2012), available at <http://arbitrateatlanta.org/wp-content/uploads/2011/08/FINAL-ITILS-toolkit-2-4-12.pdf> [hereinafter ABA Task Force on International Trade in Legal Services, *A Framework for State Bars*] (noting that “[o]ver 3600 foreign businesses from more than 60 countries have established operations in Georgia [alone]”); Texas Office of the Governor, *Foreign Investment in Texas: The Industries and Countries Leading Current Growth* [hereinafter Texas Office of the Governor, *Foreign Investment in Texas*], [www.governor.state.tx.us/files/ecodev/Foreign\\_Investment.pdf](http://www.governor.state.tx.us/files/ecodev/Foreign_Investment.pdf) (last viewed Nov. 12, 2012) (finding that more than 2,000 foreign multinationals have established locations in Texas). According to the Illinois Department of Commerce & Economic Opportunity, foreign direct investment “is a major contributor to the economic vitality of the state. Illinois ranks number one in the Midwest as a destination for foreign investment. Illinois is home to nearly 1,600 foreign firms with 6,416 locations, employing 323,362 Illinois residents. See Illinois Department of Commerce & Economic Opportunity, *Foreign Direct Investment in Illinois*, available at [http://www.ildceo.net/dceo/Bureaus/Trade/Foreign\\_Direct\\_Investment](http://www.ildceo.net/dceo/Bureaus/Trade/Foreign_Direct_Investment) (last visited Nov. 12, 2012).

<sup>2</sup> See, e.g., ABA Center for Professional Responsibility, *Comparison of ABA Model Rule for Registration of In-House Counsel With State Versions* (last updated Jan. 11, 2012), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/in\\_house\\_comp.authchecked.am.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/in_house_comp.authchecked.am.pdf). Georgia does not require registration.



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Foreign lawyers (including foreign legal consultants) are already engaged as in-house counsel within the U.S.,<sup>3</sup> but are subject to little oversight. The Commission concluded that adding foreign lawyers to both Model Rule 5.5 and the Model Rule for Registration of In-House Counsel has the benefit of ensuring that those lawyers are identifiable, subject to monitoring, and accountable for their conduct. The proposals also ensure that the foreign lawyers are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements. Their employer would have to attest to their compliance with these requirements, and the lawyers could be referred to appropriate authorities in their home jurisdictions of registration and licensure in the event of a violation.<sup>4</sup> Clients and lawyers will benefit from consistency across jurisdictions on this issue.

The definition of who would qualify under Model Rule 5.5 as a foreign lawyer is the same as the one used in longstanding ABA policy, including the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants,<sup>5</sup> which state supreme courts have adopted with no adverse consequences.

If adopted by the House of Delegates, the changes proposed in this Resolution and the accompanying Resolution to amend the Model Rule for Registration of In-House Counsel would provide state supreme courts with an approach to this issue that protects clients and the public while allowing global organizational clients to employ in-house foreign lawyers of their choice to work in their U.S. offices.

### **Relevant History**

In August 2002, the ABA House of Delegates adopted recommendations proposed by the Commission on Multijurisdictional Practice (MJP Commission) to amend Rule 5.5 of the ABA Model Rules of Professional Conduct. Among other amendments, Model Rule 5.5(d) now authorizes U.S. lawyers to provide legal services to their organizational clients in the jurisdictions where those clients are located even if the lawyers are not admitted in those jurisdictions.

At the outset of its work, the Commission asked in its Preliminary Issues Outline whether Model Rule 5.5(d) should be amended to include foreign lawyers within its practice authorization for in-

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<sup>3</sup> See, e.g., J. Charles Mokriski, *In-House Lawyers' Bar Status: Counsel, You're Not in Kansas Anymore*, Boston Bar J., Jan.-Feb. 2008.

<sup>4</sup> In this regard, the Commission is aware that the ABA Standing Committee on Professional Discipline and the ABA Task Force on International Trade in Legal Services are developing a model international reciprocal discipline notification protocol to facilitate the necessary information exchange between U.S. and non-U.S. lawyer regulators. The Commission believes the development of such a protocol is necessary and will enhance client and public protection given increased globalization of the profession.

<sup>5</sup> The ABA Model Rule on Temporary Practice by Foreign Lawyers and the August 2012 Model Rule on Practice Pending Admission also contain this definition of a foreign lawyer.

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house counsel.<sup>6</sup> Over the ensuing three years, the Commission took testimony and received many comments that have informed its consideration of this issue.

The Commission's Inbound Foreign Lawyers Working Group included active participants from the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professional Discipline, the Section of International Law, the Real Property, Trust and Estate Law Section, the Task Force on International Trade in Legal Services, and the Section of Legal Education and Admissions to the Bar. These representatives contributed significantly to the Commission's deliberations and the Resolution that accompanies this Report. The Commission is grateful for their contributions to its work. The Commission also received helpful input from many elements of the bar.

In June 2010, the Commission circulated broadly for comment templates and memoranda illustrating and explaining the basis for the proposals of its Working Group on Inbound Foreign Lawyers. At subsequent meetings, the Commission considered additional written responses and oral testimony on the subject. At its October 2012 meeting, it concluded that the realities of client needs in the global legal marketplace necessitate that the ABA address more directly limited practice authority for inbound foreign lawyers and associated regulatory concerns. As the proposed changes to Model Rule 5.5 and the accompanying Resolution to amend the Model Rule for Registration of In-House Counsel reflect, the Commission favors narrow practice authorization for qualified foreign lawyers, not full admission.

#### **Permitting Limited Practice Authorization for Foreign In-House Counsel in Model Rule 5.5**

The number of foreign companies with U.S. offices or operations in the United States has increased substantially in the last decade, as has the number of U.S. companies with foreign offices or operations, necessitating the hiring of non-U.S. lawyers into their operations. States actively recruit foreign companies to open offices in their jurisdictions. For example, the ABA Task Force on International Trade in Legal Services, in a 2012 White Paper, examined how the State of Georgia came to change its rules relating to practice authorization by foreign lawyers, including those in-house:

Over 3600 foreign businesses from more than 60 countries have established operations in Georgia, including the U.S. headquarters of such notable names as Porsche Cars North America, Siemens, ING Americas, Philips Consumer Electronics, Ciba Vision,

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<sup>6</sup> A July 2009 Report of the Special Committee on International Issues of the ABA Section of Legal Education and Admissions to the Bar noted that this was one of several areas where the ABA lacked policy relating to limited practice authority for foreign lawyers in the U.S. See ABA Section of Legal Education and Admissions to the Bar, *Report of the Special Committee on International Issues* (July 15, 2009), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/june\\_2012\\_council\\_open\\_session/2012\\_supplemental\\_report\\_5\\_foreign\\_law\\_schools.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june_2012_council_open_session/2012_supplemental_report_5_foreign_law_schools.authcheckdam.pdf). Another area where the Special Committee noted a policy gap related to *pro hac vice* admission of foreign lawyers. *Id.* at 8. This subject is addressed by the Commission in a separate Resolution to the House of Delegates.

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Intercontinental Hotels Group, Novelis, Munich Re and Mizuno. These companies directly employ approximately 194,000 Georgians and, by virtue of the ripple effect, indirectly generate jobs for many thousands more. Indeed, according to the Metro Atlanta Chamber of Commerce, foreign companies accounted for 20% of the metro area's new business activity in the last decade...The state actively recruits foreign international business, with the Georgia Department of Economic Development maintaining international offices in Brazil, Canada, Chile, China, Germany, Japan, Korea, Mexico, Israel, and the United Kingdom. At least 66 countries are represented in Atlanta by a consulate, trade office or bi-national chamber of commerce.<sup>7</sup>

Similarly, in Texas, the 2011 Foreign Investment in Texas Report issued by the Office of the Governor's Office of Economic Development and Tourism found: "Texas is a top-ranked global destination for foreign direct investment (FDI). The state's strong economy, competitive business climate, and central location within North America have attracted more than 2,000 foreign multinationals to establish locations here."<sup>8</sup>

The result of these and similar developments<sup>9</sup> has been a rise in the movement of both U.S. and foreign in-house counsel. These lawyers' employers often require them to relocate to the US from a foreign jurisdiction where the company has an office or from the U.S. to a foreign office. As noted by the ABA Task Force on International Trade in Legal Services White Paper discussed above, lawyers are enmeshed in the global economy; "[c]lients travel, lawyers follow those clients, and this has an impact on legal practice and legal regulation."<sup>10</sup>

In light of these trends, more states are likely to address this issue. The Commission concluded that these states should have guidance about how to proceed and that lawyers would benefit from uniformity in this area. For this reason, the Commission proposes to amend Model Rule 5.5(d), and to add a new black letter paragraph 5.5(e), to provide limited and regulated practice authorization to qualified lawyers who are admitted in a foreign jurisdiction but who are providing legal services solely to their employers as in-house counsel. As specified below, foreign lawyers would be limited in what they can do within the U.S. jurisdiction.

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<sup>7</sup> ABA Task Force on International Trade in Legal Services, *A Framework for State Bars*, *supra* note 1.

<sup>8</sup> See Texas Office of the Governor, *Foreign Investment in Texas*, *supra* note 1.

<sup>9</sup> For example, according to an October 2012 International Trade Administration report relating to exports, jobs and foreign investment in Utah, in 2010 foreign controlled companies employed 29,000 Utah workers. Significant sources of foreign investment in that state included the U.K, German, Japan and Switzerland. U.S. Department of Commerce International Trade Administration, *Utah: Exports, Jobs, and Foreign Investment October 2012*, <http://www.trade.gov/mas/ian/statereports/states/ut.pdf>. (last viewed Nov.12, 2012). According to the Illinois Department of Commerce & Economic Opportunity, foreign direct investment "is a major contributor to the economic vitality of the state. Illinois ranks number one in the Midwest as a destination for foreign investment. Not surprising, since Illinois offers companies unrivaled strategic location and transportation infrastructure-as well as a diversified, technologically advanced economy, productive workforce, and a world-class cultural environment. Illinois is home to nearly 1,600 foreign firms with 6,416 locations, employing 323,362 Illinois residents." See Illinois Department of Commerce and Economic Opportunity, *Foreign Direct Investment in Illinois*, *supra* note 1.

<sup>10</sup> *Supra* note 5.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

### **Permitting Limited Practice Authorization by Foreign In-House Counsel**

For purposes of the proposed amendments to Model Rule 5.5, the meaning of “foreign lawyer” would be defined in paragraph (e) to mean people who are members in good standing of a recognized legal profession in the lawyer’s home country. Moreover, the members must be subject to effective regulation and discipline by a duly constituted professional body or public authority. This is the definition that has long been used in the ABA Model Rule on Licensing and Practice by Foreign Legal Consultants, which state supreme courts have adopted with no adverse consequences.<sup>11</sup>

The Commission’s proposal contains important client protections. The lawyer may not advise on an issue concerning the law of a U.S. jurisdiction except in consultation with a U.S. lawyer authorized to provide such advice.<sup>12</sup> The requirement that the foreign lawyer consult with a qualified U.S. lawyer on questions of U.S. law is consistent with the requirement set forth in Section 3(e) of the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants. The foreign in-house lawyer is subject to the U.S. jurisdiction’s rules of professional conduct and to the disciplinary authority of the jurisdiction. The Commission’s companion Resolution to add foreign in-house counsel to the ABA Model Rule for Registration of In-House Counsel would require that the foreign lawyer register with the duly authorized registration authority in the state, prove his or her admission and good standing in the bar of his or her jurisdiction, pay both annual dues and annual client protection fund assessments, satisfy the U.S. jurisdiction’s continuing legal education requirements, and present an affidavit from an officer of his or her employer attesting to compliance with the Rule.

Adding foreign lawyers to Model Rule 5.5’s practice authority for in-house counsel benefits the clients of those lawyers without subjecting them or the public to any increased risks. The premise of Rule 5.5(d) is that a U.S. licensed in-house lawyer can establish an office or other “systematic presence” in a jurisdiction where that lawyer is not admitted and forgo traditional local licensure without unreasonable risk to the client or public because: (1) the employer is able to assess the lawyer’s qualifications and the quality of the lawyer’s work; and (2) the lawyer’s only client is the employer. The Commission on Ethics 20/20 concluded that these rationales also apply to foreign in-house counsel if other protections are in place.<sup>13</sup>

The Conference of Chief Justices has indicated its approval of the Commission’s approach to this issue. The Conference’s Task Force on the Regulation of Foreign Lawyers and the International Practice of Law endorsed in principle – and the Conference itself approved in principle – an

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<sup>11</sup> For example, see the foreign legal consultant rules for states including, but not limited to, Georgia, Massachusetts, New Mexico, North Dakota, Utah, and Virginia.

<sup>12</sup> The Commission used “authorized” in conjunction with the consulting U.S. lawyer, instead of “admitted,” because, while the consulting U.S. lawyer may not be admitted in the jurisdiction at issue, he or she may be permitted to advise on that U.S. jurisdiction’s law pursuant to authorization under another rule.

<sup>13</sup> *Supra* note 1.

earlier version of this proposal and urged adoption of the Commission's recommendation by the ABA House of Delegates.<sup>14</sup>

Some commenters have suggested that the proposed constraints on foreign in-house counsel are too restrictive (e.g., it is not necessary to require such counsel to consult with U.S. counsel when advising on issues of U.S. law). They argue that these foreign lawyers could offer advice on U.S. law to their organizational clients from their home jurisdictions, so they should be able to offer the same advice to the same clients while on U.S. soil. The Commission rejected this argument because U.S. lawyers are subject to similar constraints on where they are permitted to offer their advice. For example, a New Hampshire lawyer can offer advice about Missouri law while in New Hampshire, but the New Hampshire lawyer is not permitted to relocate to Missouri and offer advice on Missouri law without becoming licensed to practice. Also, as referenced above, this limitation is consistent with the limitation already contained in the Model Foreign Legal Consultant Rule.

Conversely, some commenters have suggested the proposal is not sufficiently restrictive. They argue that it would open the floodgates to unlimited practice by foreign lawyers in the U.S. As noted above, this proposal would not permit unlimited practice or practice for clients other than the organizational client. Moreover, foreign lawyers are already engaged as in-house counsel within the U.S., but are subject to relatively little oversight. Adding foreign lawyers to Model Rule 5.5 and also to the Model Rule for Registration of In-House Counsel enables organizational clients to meet their needs with counsel of their choice, while ensuring that foreign lawyers are identifiable, subject to monitoring, and accountable for their conduct. In Georgia, there was recognition by a broad segment of the bar that it was sensible to consider these developments before a regulatory crisis occurred, not after the fact. The State Bar of Georgia considered what regulations would protect the public and recognized that a balanced regulatory approach to globalization could enhance the state's business climate and attractiveness for foreign trade and investment.<sup>15</sup> The Commission also believes that it is best to acknowledge and address these realities.

Nor is the specter of foreign in-house lawyer malpractice or misconduct well-founded. Arizona, Connecticut, Delaware, Georgia, Virginia, Washington, and Wisconsin currently permit foreign in-house counsel to work for their employers, and there have been no adverse consequences. Moreover, the Commission's proposals provide additional client protections than the Rules found in some of those states.

Finally, one commenter suggests that the Commission's proposal is flawed because communications between foreign in-house lawyers and their clients in the U.S. may not be privileged because most other nations do not recognize the attorney-client privilege in the in-house context. The privilege issue long predates the Commission's proposals. It arises whenever

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<sup>14</sup> See Conference of Chief Justices, *Resolution 13: Endorsing in Principle the Recommended Changes to the ABA Model Rules Regarding Practice by Foreign Lawyers*, <http://ccj.ncsc.dni.us/InternationalResolutions/resol13ABA.html> (last viewed March 14, 2011). The version before the Conference did not include the requirement for consultation with a U.S. lawyer and was, thus, less restrictive than the instant proposal. In the Conference's Resolution it noted that "legal transactions and disputes involving foreign law and foreign lawyers is increasing."

<sup>15</sup> *Supra* note 7.

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a matter crosses national borders, for example, with regard to communications with foreign in-house lawyers abroad when the litigation is here in the U.S. and for communications with U.S. lawyers here or abroad when the litigation is abroad. Multinational organizations must and do address this issue today when they rely on non-U.S. lawyers wherever they sit.<sup>16</sup>

### **Conclusion**

These proposed amendments to Rule 5.5 of the ABA Model Rules of Professional Conduct and its Comments meet the needs of 21<sup>st</sup> century clients and counsel while providing adequate safeguard for the courts, the profession, and the public. The Commission on Ethics 20/20 respectfully requests that the House of Delegates approve the amendments to the Model Rule 5.5.

Respectfully submitted,

ABA Commission on Ethics 20/20  
Jamie S. Gorelick, Co-Chair  
Michael Traynor, Co-Chair

February 2013

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<sup>16</sup> U.S. courts will sometimes consider communications with foreign lawyers to be privileged without regard to whether that lawyer's home jurisdiction would do so. See FED. R. EVID. 501. See, e.g., *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D.N.Y. 2010).

# APPENDIX C

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AMERICAN BAR ASSOCIATION

COMMISSION ON ETHICS 20/20

SECTION OF BUSINESS LAW

SECTION OF INTERNATIONAL LAW

TORT TRIAL & INSURANCE PRACTICE SECTION

STANDING COMMITTEE ON CLIENT PROTECTION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE

STANDING COMMITTEE ON PROFESSIONALISM

STANDING COMMITTEE ON SPECIALIZATION

TASK FORCE ON INTERNATIONAL TRADE IN LEGAL SERVICES

NEW YORK STATE BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

## RESOLUTION

1 **RESOLVED**, That the American Bar Association amends Rule 5.5 of the ABA Model  
2 **Rules of Professional Conduct** as follows (insertions underlined, deletions ~~struck through~~):

### **RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW**

7 (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of  
8 the legal profession in that jurisdiction, or assist another in doing so.

9 (b) A lawyer who is not admitted to practice in this jurisdiction shall not:

10 (1) except as authorized by these Rules or other law, establish an office or  
11 other systematic and continuous presence in this jurisdiction for the practice of law;  
12 or

13 (2) hold out to the public or otherwise represent that the lawyer is admitted  
14 to practice law in this jurisdiction.

15 (c) A lawyer admitted in another United States jurisdiction, and not disbarred or  
16 suspended from practice in any jurisdiction, may provide legal services on a  
17 temporary basis in this jurisdiction that:

18 (1) are undertaken in association with a lawyer who is admitted to practice  
19 in this jurisdiction and who actively participates in the matter;

20 (2) are in or reasonably related to a pending or potential proceeding before a  
21 tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is  
22 assisting, is authorized by law or order to appear in such proceeding or reasonably



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expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates; ~~and~~ are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on ~~concern~~ the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a ~~are undertaken in consultation with a U.S.~~ lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

## COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as

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paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review

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of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. as well as Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also Model Rule on Temporary Practice

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161 by Foreign Lawyers. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is  
162 admitted to practice law in another United States or foreign jurisdiction and who establishes an  
163 office or other systematic or continuous presence in this jurisdiction must become admitted to  
164 practice law generally in this jurisdiction.

165 [16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client  
166 to provide legal services to the client or its organizational affiliates, i.e., entities that control, are  
167 controlled by, or are under common control with the employer. This paragraph does not  
168 authorize the provision of personal legal services to the employer's officers or employees. The  
169 paragraph applies to in-house corporate lawyers, government lawyers and others who are  
170 employed to render legal services to the employer. The lawyer's ability to represent the  
171 employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of  
172 the employer and does not create an unreasonable risk to the client and others because the  
173 employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's  
174 work. To further decrease any risk to the client, when advising on the domestic law of a United  
175 States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice  
176 under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed  
177 and authorized by the jurisdiction consult with a U.S. lawyer authorized to provide it that advice.

178 [17] If an employed lawyer establishes an office or other systematic presence in this  
179 jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be  
180 subject to registration or other requirements, including assessments for client protection funds  
181 and mandatory continuing legal education. See Model Rule for Registration of In-House  
182 Counsel.

183 [18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal  
184 services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal  
185 or other law, which includes statute, court rule, executive regulation or judicial precedent. See,  
186 e.g., *Model Rule on Practice Pending Admission*.

187 [19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or  
188 otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

189 [20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to  
190 paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law  
191 in this jurisdiction. For example, that may be required when the representation occurs primarily  
192 in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

193 [21] Paragraphs (c) and (d) do not authorize communications advertising legal services  
194 in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and  
195 how lawyers may communicate the availability of their services in this jurisdiction is governed  
196 by Rules 7.1 to 7.5.